Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

SOUTH CAROLINA STATE BOARD OF DENTISTRY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an order denying "state action" antitrust immunity asserted by a state agency under *Parker v. Brown*, 317 U.S. 341 (1943), is immediately appealable under the collateral order doctrine.

PARTIES TO THE PROCEEDING

Petitioner is the South Carolina State Board of Dentistry, a state agency created by statute (*S.C. Code Ann.* §§40-15-10, et seq.). Respondent is the Federal Trade Commission.

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PETITION FOR WRIT OF CERTIORARI

Petitioner South Carolina State Board of Dentistry respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-20a) is not yet reported. The opinion and order of the Federal Trade Commission (App., *infra*, 21a-64a) are also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 2006. A petition for rehearing was denied on June 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the collateral order doctrine, which this Court has described as a "practical construction" of 28 U.S.C. § 1291. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). That statute provides in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. . . .

The analogous statute governing appeals from orders of the Federal Trade Commission is 15 U.S.C § 45(c). *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 246 (1980). That section provides in pertinent part:

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used. . .

STATEMENT

This action was brought in September 2003 by the Federal Trade Commission ("FTC" or "Commission") against the South Carolina State Board of Dentistry ("Board").[1] The Complaint sought an Order requiring the Board to cease and desist from requiring an examination by a dentist before certain activities could be performed by dental hygienists. This practice had been effectively abandoned by the Board in January 2002, well before the present action was filed.

The activity of the Board that led to the filing of this action was the enactment of a temporary state regulation in 2001. Dental Board Regulation 39-18, 25-7 S.C. Reg. 79 (2001). Under state law, such temporary regulations expire at

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[1] The terms "FTC" or "Commission" will be used herein to refer to the Commission in its adjudicatory capacity. The term "Respondent" will be used to refer to the Commission in its capacity as a litigating party.

the end of 180 days, App., *infra*, 4a. The regulation in question expired in January 2002.

The underlying issue arose out of conflicting interpretations of certain amendments made in 2000 to the state statutes governing dental hygiene in public health settings.[2] The Board of Dentistry interpreted these amendments as retaining a previous statutory requirement that children in public health settings must be examined by a dentist before dental hygienists could perform such treatments as the application of sealants over teeth. The temporary 180-day regulation that was in effect from July 2001 through January 2002 embodied the Board's interpretation of the 2000 state statutory amendments.

The Board's temporary regulation was the subject of disagreement. A private state court action was filed two years before the Federal Trade Commission brought the present action.[3] The differing views at the state level were eventually resolved in June 2003 with the enactment by of compromise legislation by the South Carolina legislature.[4] As the Court of Appeals noted, this action, which commenced in September 2003, was not filed until "twenty months after the emergency regulation had expired and three months after the South Carolina legislature had enacted compromise legislation supported by both the Board and hygienists. . . . " App., *infra*, 5a.[5] At oral argument before the

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[2] S.C. Act No. 298 of 2000, Jt. App. 168-169.

[3] The private plaintiffs in the state litigation were unsuccessful in obtaining temporary injunctive relief in 2001. The case is still pending in state court as a damage action.

[4] S.C. Act No. 45 of 2003, Jt. App. 172-177.

[5] In a footnote, the Court of Appeals noted that the 2003 state legislation "eliminated the preexamination requirement for patients being treated in the 'public health' setting. . . ." App.,

Court of Appeals, counsel for the Respondent conceded that he was not aware of any subsequent effort by the Board to reinstate the preexamination requirement.

The Board filed a motion to dismiss this action, as specifically authorized by the FTC, asserting two grounds: mootness, as described above, and the application of the state action immunity doctrine as first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). Jt. App. 13-14. These issues were briefed and orally argued before the full Commission in early 2004. In an opinion and order issued on July 28, 2004, the Commission denied the Board's motion to dismiss based on state action immunity grounds. App., *infra*, 21a-64a. The Commission's decision regarding immunity was based in large part on the Commission's adopting a construction of the pertinent state statutes that differed from the State Board of Dentistry's construction of the same statutes. App., *infra*, 50a-56a. On the mootness issue, the Commission held the Board's motion to dismiss in abeyance, referring the issue to an Administrative Law Judge for limited discovery and for an assessment of whether the complained-of conduct that occurred in 2001 would be likely to occur again in light of the 2003 state statutory amendments and other developments. App., *infra*, 62a-63a.[6]

The Board filed a Petition for Review with the Court of Appeals, seeking review of only the part of the FTC Order

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infra, 5a n.3. The public health setting is the only setting for which the Commission sought a cease and desist order. Complaint, Jt. App. 11.

[6] When the Board filed its Petition for Review in the Court of Appeals, the FTC granted the Board's unopposed motion for stay of further proceedings before the FTC pending appeal. The FTC on August 9, 2006 also granted a similar unopposed motion for stay pending the resolution of the present Petition for Certiorari.

that denied the Board's motion to dismiss based on state action immunity.[7] The Respondent in turn filed a motion to dismiss the appeal on the ground that the appeal was interlocutory. The Court of Appeals received briefs regarding that motion, and after approximately a year, issued an order deferring action on the motion to dismiss appeal until oral argument. The case was then briefed and argued on both the appealability and the immunity issues.

On May 1, 2006, the Court of Appeals dismissed the appeal, holding that the collateral order doctrine did not apply to the issue of *Parker* immunity. The court recognized that its opinion was in conflict with holdings in two circuits and dicta in cases in two others. App., *infra*, 7a-8a. Only one circuit, the Sixth, has reached the same result on this issue as the Court of Appeals in the present case. *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986). The Board's petition for rehearing and suggestion for rehearing en banc were denied by order dated June 27, 2006. App., *infra*, 65a-66a.

REASONS FOR GRANTING THE PETITION

This case combines the federalism interests protected by two separate lines of authority dealing, respectively, with state action immunity in antitrust cases and with the immediate appealability of orders denying immunity to public officials and entities. The first line, which began with *Parker v. Brown*, 317 U.S. 341 (1943), effectively immunizes state action from federal antitrust review. The second line, which has arisen in the context of several different governmental immunities, permits immediate appeals by state entities and officials of

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[7] The Board did not assert that the FTC's nonfinal decision ordering discovery on the mootness issue was immediately appealable.

orders denying immunity.[8] As several circuits have held, the state interests protected by *Parker* immunity are of the same kind as the interests protected by other immunities extended to state officials and entities. As a result, orders denying *Parker* immunity to state actors should be uniformly held to be immediately appealable, lest the immunity be rendered largely ineffective.

There is now a substantial split among the circuits on the precise issue presented by this Petition, as the Court of Appeals has acknowledged. App., *infra*, 7a-8a.

A. The Court Of Appeals' Decision Conflicts With Decisions Of Other Courts Of Appeals.

The opinion of the Court of Appeals has revived a circuit split that appeared to be moribund prior to the decision in this case. This issue was first presented at the court of appeals level in 1986, when the Sixth Circuit rejected an appeal of a denial of *Parker* immunity. *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 568 (6th Cir. 1986). However, in the ensuing twenty years, and until the present case was decided below, every other court that considered the issue reached the opposite result, and permitted such appeals.

The next case after *Huron Valley* to decide the issue was decided only a few months later in 1986. In that case, *Commuter Transp. Sys. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986)("*Hillsborough*"), the

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[8] *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982)(absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)(qualified immunity; *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993)(Eleventh Amendment immunity).

Eleventh Circuit permitted an immediate appeal by a county agency, holding that the case involved the agency's "right not to stand trial because of state action and statutory immunity." 801 F.2d at 1290. In the Eleventh Circuit, *Hillsborough* has been followed by at least four other cases.[9]

The Fifth Circuit has likewise held several times that a denial of *Parker* immunity is immediately appealable. *Martin v. Memorial Hosp.*, 86 F.3d 1391 (5th Cir. 1996); *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir.), cert. denied 525 U.S. 982 (1998); *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000).

In the meantime, as the Court of Appeals in this case expressed it, two other circuits have "suggested . . . in dicta," that a denial of *Parker* immunity is immediately appealable. *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3rd Cir. 1999); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir.1987). App., *infra,* 8a.

The familiar three-part test for reviewability under the collateral order doctrine, first set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) requires that the decision below must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, ___ U.S. ___, 126 S.Ct. 952, 957 (2006).

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[9] *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. 1996); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (1996); *Askew v. DCH Regional Health Care Authority*, 995 F.2d 1033 (11th Cir.), cert. denied, 510 U.S. 1012 (1993); *Bolt v. Halifax Hosp. Medical Center, 980 F.2d 1381* (11th Cir. 1993).

In each of the conflicting court of appeals cases where the point was actually decided, there was no factual or procedural aspect that distinguished one case from another. Instead, the circuits have simply disagreed on the manner in which the three tests of the collateral order doctrine apply when state action immunity is claimed.

In the present case, the Court of Appeals held that the FTC's decision was "neither 'completely separate from the merits' nor 'effectively unreviewable' after trial. . . ." App., infra, 8a.[10] The Court of Appeals did not deny that its decision was at odds with the above-cited cases from four other circuits. In *Hillsborough, supra*, the Eleventh Circuit squarely held the opposite, i.e., that the lower court order "denying summary judgment based on immunity resolves an important issue separate from the merits. . . ." 801 F.2d at 1289. *Hillsborough* also held that *Parker*, like *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Mitchell, supra*, created an immunity from suit, making its denial by the lower court "effectively unreviewable on appeal from a final judgment." *Id. Accord, Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1397 (5th Cir. 1996)("a claim of such state action immunity is conceptually distinct from the merits of the plaintiff's claim that he has been damaged by the defendants' alleged violation of the federal antitrust laws").

The Court of Appeals in this case, by contrast, held that the *Parker* doctrine is only a defense to the merits, rather than an immunity. Under that view, *Parker* issues do not meet two of the three parts of the test for collateral review, because *Parker* issues, so viewed, are neither separate from

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[10] The Court of Appeals agreed that the first requirement had been satisfied, i.e., that the FTC's decision conclusively determined the disputed question. App., *infra*, 7a.

the merits nor effectively unreviewable on appeal from a final judgment. The Sixth Circuit held likewise with respect to those two aspects of the reviewability test. *Huron Valley*, 792 F.2d at 567. The existence of a circuit conflict is therefore undeniable.

B. The Court Of Appeals Erroneously Held That The FTC's Denial Of *Parker v. Brown* Immunity Was Not Immediately Reviewable.

The decision of the Court of Appeals on both the second and third aspects of the collateral order doctrine was founded solely on the court's erroneous conclusion that *Parker* created only an ordinary defense to liability rather than a federalism-based immunity. In addition to reviving a circuit conflict, this reasoning represents an incorrect analysis of which issues are "merits" issues, as will be outlined briefly herein. In addition, the decision was at odds with this Court's frequent recognition of the important federalism interests protected by *Parker* immunity.

1. The Court Of Appeals Incorrectly Equated "State Action" Analysis With Issues Involving The Merits.

The nature of an "immunity" is that it protects the defendant from suit even if the defendant can be shown to have damaged the plaintiff through some wrongful act. As this Court has held, "a legal [i.e., "merits"] defense may well involve 'the essence of the wrong,' while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) In other words, a claim of immunity does not deny the existence of wrongdoing or damage. In the context of the present case, if a group of private parties had taken a private anticompetitive action that had prevented hygienists from

performing certain functions without an examination by a dentist, the merits issues would be whether the private acts of those defendants constituted an unfair method of competition, caused damage, and should be remedied. There would be no issue of whether the defendants were immune from suit as state actors.

The merits issues in this case are no different: assuming without conceding that the actions of the Dental Board were not state action, the FTC would still need to find that those acts constituted an unfair method of competition, caused damage, and should be remedied. The issue of whether the Board's action was "state action" or not is a preliminary inquiry that determines only whether the Board's action is immunized by *Parker*, regardless of whether it had anticompetitive effect or caused damage. The court below and the Sixth Circuit in *Huron Valley* incorrectly equated the *Parker* inquiry with inquiry into "the essence of the wrong."

The Court of Appeals held that *Parker* involved "a strict standard for locating the reach of the Sherman Act," App., *infra*, 14a, but this does not cause the *Parker* doctrine to lose its effect of creating an immunity from suit. The fact that the immunity arises from a statute does not transform it into something other than an immunity. Stated differently, if a state board had acted so far beyond its jurisdiction as arguably to lose its state action immunity (for instance, if the Dental Board had sought to regulate engineers), the plaintiff would still need to prove that even those unauthorized actions by state officials actually had anticompetitive effects and damaged the plaintiff. If anticompetitive effects and damage to the plaintiff cannot be shown, the plaintiff will be held to have no claim on the merits. The presence or absence of state authorization is relevant only to determine whether the state actor can be sued.

2. The Court Of Appeals Failed To Recognize That *Parker* Protects Important Federalism Interests.

The Court of Appeals failed to recognize that *Parker* represents both Congressional and judicial respect for state sovereignty, as shown by both branches' refusal to extend federal antitrust law to state actions. The Court of Appeals instead characterized *Parker* as aimed only at "protect[ing] against . . . a misinterpretation of federal antitrust laws." This characterization minimizes *Parker* in a way that is inconsistent with this Court's holdings that *Parker* is a doctrine rooted in federalism. Indeed, the Court of Appeals did not mention federalism at all, suggesting an underlying misconception of the rationale for the state action doctrine.

The federalism roots of the doctrine are stated in *Parker* itself, which holds that

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker, 317 U.S. at 351. This Court later expressly held *Parker* to be based on federalism principles:

> The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 374 (1991). The Court of Appeals, in contrast, examined *Parker* and concluded that the case's only rationale was only to "protect against . . a misinterpretation of federal antitrust laws." App., *infra,* 14a.

The present case provides a good illustration of why immediate appeals of denials of *Parker* immunity are necessary for the protection of federalism interests. The defendant is a state regulatory authority. It acted under state law in order to prevent potential harm to the public health. *See* App., *infra*, 4a. The Board was subsequently brought before the Commission, a federal antitrust tribunal, on a claim based solely on that federal agency's disagreement with state authorities over the proper construction of state statutes. *See* App., *infra*, 50a-56a. In so doing, the FTC did exactly what this Court in *City of Columbia v. Omni, supra,* said not to do: it converted a state administrative law dispute about the Board's authority under state law "into a federal antitrust job." 499 U.S. at 372.

If the FTC is given unreviewable authority to require a state agency to stand trial on the merits, based only on the FTC's differing opinion about an issue of state law, the federal-state balance will be skewed greatly to the FTC's advantage. Actions such as the present one are costly and time-consuming for state agencies. Many state agencies may lack the time and the resources to go through the entire FTC adjudicative process. Such agencies would be constrained to consider acquiescing in consent orders, solely because they could not afford to defend a practice they believed to be a valid exercise of their powers as state regulators.

In addition, *Mitchell* has recognized that one reason for immediate review of denials of immunity is to prevent "distraction of officials from their governmental duties [and]

inhibition of discretionary action. . . ." 472 U.S. at 526. The possibility of lengthy and costly antitrust litigation presents obvious possibilities of disruption to state regulatory activities. As a result, the issue of state action immunity should be reviewable at the earliest opportunity.

This Court should therefore grant the petition and reverse the decision of the Court of Appeals in order to provide for a uniform national rule permitting that state actors to appeal immediately when federal antitrust authority is invoked in an effort to enjoin the regulatory activity of a state agency.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTH CAROLINA STATE BOARD OF DENTISTRY, *Petitioner,*	)	
v.	)	No. 04-2006
FEDERAL TRADE COMMISSION, *Respondent.*	)	

On Petition for Review of an Order
of the Federal Trade Commission.
(D9311)

Argued March 15, 2006

Decided May 1, 2006

Before MOTZ and TRAXLER, Circuit Judges, and James P. JONES, Chief United States District Judge for the Western District of Virginia, sitting by designation.

Dismissed by published opinion. Judge Motz wrote the opinion, in which Judge Jones joined. Judge Traxler wrote an opinion concurring in part and concurring in the judgment.

COUNSEL

ARGUED: Kenneth Paul Woodington, DAVIDSON, MORRISON & LINDEMANN, P.A., Columbia, South Carolina, for Petitioner. Michael Daniel Bergman, FEDERAL TRADE COMMISSION, Washington, D.C., for Respondent. **ON BRIEF:** Lynne W. Rogers, General Counsel, SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING & REGULATION, Columbia, South Carolina; William H. Davidson, II, Andrew F. Lindemann, DAVIDSON, MORRISON & LINDEMANN, P.A., Columbia, South Carolina, for Petitioner. Jeffrey Schmidt, Director, Jeffrey Brennan, Associate Director, Bureau of Competition, William Blumenthal, General Counsel, John F. Daly, Deputy General Counsel for Litigation, FEDERAL TRADE COMMISSION, Washington, D.C., for Respondent.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

The Federal Trade Commission ("FTC") brought this action against the South Carolina State Board of Dentistry ("Board"), alleging that the Board engaged in unfair competition by promulgating an emergency regulation that prevented oral hygienists from performing certain services in school settings unless a dentist had first examined a student and prescribed a course of treatment. The Board countered, *inter alia*, that it was immune from suit under the "state action antitrust immunity" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). After the FTC refused to grant that protection, the Board brought this interlocutory appeal,

arguing that the denial of *Parker* protection falls within the narrow class of "collateral orders" that may be appealed notwithstanding their lack of finality. We disagree, and dismiss the appeal for lack of jurisdiction.

I.

In 2000, South Carolina amended its Dental Practice Act. The legislature, concerned that many school children in low-income areas were receiving inadequate dental care because of the scarcity of providers, relaxed the restrictions on oral hygienists performing oral prophylaxis[1] and applying sealants in schools. Prior to the 2000 amendments, hygienists could only perform those services in schools if a dentist had personally examined the patient within the preceding 45 days and had authorized such treatment. *See* S.C. Code Ann. § 40-15-80(C) (West Supp. 1999). After the 2000 amendments, however, hygienists could perform those services so long as they were under the "general supervision" of a dentist. *Id.* § 40-15-80 (West Supp. 2003). "General supervision," in turn, "means that a licensed dentist ... has *authorized* the procedures to be performed but does not require that a dentist be present when the procedures are performed." *Id.* § 40-15-85(2) (West Supp. 2003) (emphasis added). The amended statute did not define the term "authorized."

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[1] The statute defines oral prophylaxis as "the removal of any and all hard and soft deposits, accretions, toxins, and stain from any natural or restored surfaces of teeth or prosthetic devices by scaling and polishing as a preventive measure for the control of local irritational factors." S.C. Code Ann. § 40-15-85(3) (West Supp. 2003).

In January 2001, Health Promotion Services ("HPS"), a private dental services firm, began sending hygienists to schools in South Carolina to provide preventative dental care. HPS's hygienists performed oral prophylaxis and applied sealants on students that had not been pre-examined by dentists. In early July of that year, the Board received reports of "substandard patient care" by those hygienists.

On July 27, 2001, in order to prevent any future harm, the Board enacted an emergency regulation pursuant to its rulemaking authority under S.C. Code Ann. § 40-15-40 (West 2001). That regulation reinserted the preexamination requirement into § 40-15-85(B) by defining the term "authorized" to mean:

> the supervising dentist must have clinically examined the patient and actually determined the need for any specific treatment. Before treatment may be performed by a dental hygienist, the supervising dentist must provide a written work order for the procedure(s) to be performed by the dental hygienist. A clinical examination must be conducted by the supervising dentist for each patient not more than forty-five (45) days prior to the date the dental hygienist is to perform the procedure for the patient.

25-7 S.C. Reg. 79-80 (July 27, 2001). Under South Carolina law, this emergency regulation expired after 180 days, in January 2002. *See* S.C. Code Ann. § 1-23-130(C) (West 2005).[2]

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[2] Normally, emergency regulations are only valid for 90 days. Because the legislature was out of session both when the

On September 12, 2003--twenty months after the emergency regulation had expired and three months after the South Carolina legislature had enacted compromise legislation supported by both the Board and hygienists[3] --the FTC instituted this action against the Board. Under 15 U.S.C.A. § 45(b) (West 1997), such actions are adjudicated in an administrative hearing before the FTC. If the FTC issues a cease-and-desist order, the defendant may appeal directly to this court. *See id.* § 45(c).

The Board asserted two defenses during the FTC proceeding. First, it claimed the action was moot in light of the 2003 amendments to the Dental Practice Act. Second, it argued that it was entitled to "state action antitrust immunity" under *Parker v. Brown*, 317 U.S. 341 (1943), in which the Supreme Court held that the Sherman Act should not be presumed to apply to states. On July 28, 2004, the FTC denied the Board's request for *Parker* protection but determined that it could not resolve the mootness issue without additional discovery into whether the challenged conduct was likely to recur. It therefore referred the case to an ALJ for limited discovery on that question.[4] The Board

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regulation was filed and when the 90-day period expired, this regulation was extended for an additional 90 days.

[3] *See* 2003 S.C. Acts 210-15. Those amendments eliminated the preexamination requirement for patients being treated in the "public health" setting (*i.e.*, by hygienists working under the control of the Department of Health and Environmental Control State Dental Coordinator), while maintaining the preexamination requirement for hygienists working in private dental offices. *See* S.C. Code Ann. §§ 40-15-102, -110 (West Supp. 2003).

[4] On August 17, 2004, the FTC stayed that discovery pending the outcome of this appeal.

then filed this interlocutory appeal of the FTC's rejection of the state action antitrust exemption.

II.

The central question in this case is whether the Board may presently appeal the FTC's determination that it is not entitled to *Parker* protection. Generally, a party may only appeal from an order that "ends litigation on the merits and leaves nothing for the court to do but execute the judgment." *Caitlin v. United States*, 324 U.S. 229, 233 (1945). *See also* 28 U.S.C.A. § 1291 (West 1993) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States....").[5] The Supreme Court has, however, allowed interlocutory appeals in a "small class" of cases that "finally determine claims of right separable from, and collateral to, rights asserted in the action." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

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[5] We note that the Federal Trade Commission Act does not use the same "final judgment" language as § 1291; instead, it conditions appellate jurisdiction on "an order of the Commission to cease and desist from using any method of competition or practice." 15 U.S.C.A. § 45(c) (West 1997). Given this distinction, an argument could be made that the collateral order doctrine, which represents a "practical construction" of § 1291's final judgment rule, *see Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994), does not apply. The FTC does not advance this argument, however. Moreover, the Supreme Court seems to have rejected this contention. *See Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 246 (1980) (applying collateral order analysis to determine whether FTC's non-final decision to issue an administrative complaint was immediately appealable). Therefore, for the purposes of this case, we assume that the collateral order analysis applies to the FTC's decision.

Although the collateral order doctrine has never been expansive, the Court's recent pronouncements on the subject stress that only a very few types of interlocutory orders can qualify as immediately appealable collateral orders, lest the doctrine "overpower the substantial finality interests § 1291 is meant to further." *Will v. Hallock,* 126 S. Ct. 952, 957 (2006); *see also id.* at 958 ("[W]e have not mentioned applying the collateral order doctrine recently without emphasizing its modest scope."); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) ("[T]he 'narrow' exception should stay that way ....") (citation omitted)).

The Court has thus reserved "collateral order" status only for orders that meet three "stringent" conditions: an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will,* 126 S. Ct. at 957. *See also Digital Equip. Corp.*, 511 U.S. at 867. "If the order fails to satisfy any one of these requirements, it is not an immediately appealable collateral order." *Carefirst of Md., Inc. v. Carefirst Urgent Care Ctr.*, 305 F.3d 253, 258 (4th Cir. 2002).

There is no dispute that the denial of *Parker* protection satisfies the first collateral order requirement; a decision that the Board is not entitled to such protection "conclusively determines" the question of whether the Board is subject to the Federal Trade Commission Act restrictions on anticompetitive conduct. The circuits are divided, however, as to whether the denial of *Parker* protection satisfies the final two requirements. Two circuits have said that it does. *See Martin v. Memorial Hosp.*, 86 F.3d 1391, 1394-97 (5th Cir. 1996); *Commuter Transp. Sys. v.*

Hillsborough Cty. Aviation Auth., 801 F.2d 1286, 1289 (11th Cir. 1986). Two others have suggested the same in dicta. *See We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3rd Cir. 1999); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987). The Sixth Circuit, however, has held that the denial of *Parker* protection fails to meet either of the final two collateral order requirements. *See Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986). Because we too conclude that the *Parker* analysis is neither "completely separate from the merits" nor "effectively unreviewable" after trial, we join the Sixth Circuit in holding that the denial of *Parker* protection is not an immediately appealable collateral order.

III.

An order is only "collateral" to the merits of a case if it does not "involve[ ] considerations that are 'enmeshed in the factual and legal issues compromising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). The issues raised in an interlocutory appeal need not be identical to those to be determined on the merits to fail under this requirement; only a *threat* of substantial duplication of judicial decision making is necessary.

Thus, time and again the Supreme Court has refused to find an order to be "collateral" when entertaining an immediate appeal might require it to consider issues intertwined with -- though not identical to -- the ultimate merits inquiry. For example, in *Cunningham v. Hamilton County*, 527 U.S. 198 (1999), the Court held a sanctions order not sufficiently "collateral" because an interlocutory appeal of that order "may require the reviewing court to

inquire into the importance of the information sought or the adequacy or truthfulness of a response." *Id.* at 205. In *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), the Court held an order refusing to dismiss on *forum non conveniens* grounds not "collateral" because its immediate consideration could require a court to "scrutinize the substance of the dispute between the parties to evaluate what proof is required." *Id.* at 528. And in *Coopers & Lybrand*, the Court found an order denying class certification not "collateral" because immediate appellate review of that decision could require analysis of questions entangled with the merits, such as the typicality and commonality of claims. 437 U.S. at 469 & n.12.

The kind of interlocutory order at issue here -- one denying *Parker*'s protection -- is similarly not separable from the merits of the underlying action. Explaining why this is so requires a brief examination of the three situations in which a party may invoke the *Parker* doctrine. First, if that party is the "state itself"- - *i.e.*, the state legislature or the courts[6] --

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[6] The Supreme Court has specifically reserved judgment on whether a governor (and other executive branch officers) may invoke *ipso facto Parker* immunity. *See Hoover v. Ronwin*, 466 U.S. 558, 568 n.17 (1984). It has, however, suggested that the answer is no. *See S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 57 (1985) (stating that "[t]he circumstances in which *Parker* immunity is available ... to state agencies or officials regulating the conduct of private parties" are governed by the "clear articulation" test set forth in *California Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)). Nevertheless, several courts of appeals have extended the *ipso facto Parker* exemption to executive officers and agencies. *See, e.g., Neo Gen Screening, Inc. v. New Eng. Newborn Screening Program*, 187 F.3d 24, 29 (1st Cir. 1999) (state board of health); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 875-76 (9th Cir.1987) (state director of transportation);

its actions "*ipso facto* are exempt from the operation of antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). Second, municipalities may invoke the state action doctrine if they can "demonstrate that their anticompetitive activities were authorized by the State pursuant to state policy to displace competition." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985) (internal quotation marks omitted). Third, *Parker* may shield a private party (1) that acts pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition and (2) whose actions are "actively supervised by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted).

This framework demonstrates why *Parker* analysis is not separable from the merits of the antitrust action. In two of the three circumstances in which *Parker* applies, a court must look to state law and determine if the state has a clearly articulated policy to displace competition. That inquiry is inherently "enmeshed" with the underlying cause of action, which requires a determination of whether a defendant has used "unfair methods of competition in or affecting commerce" or "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C.A. § 45(a)(2) (West 1997). As the Sixth Circuit put it, "[t]he analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct .... [is] intimately intertwined with the ultimate determination that

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Saenz v. Univ. Interscholastic League, 487 F.2d 1026, 1027-28 (5th Cir. 1973) (Extension Division of University of Texas at Austin). The Board urges us to follow suit and hold it is entitled to *ipso facto Parker* immunity. Given that we lack jurisdiction to consider this appeal, we do not reach this issue.

anticompetitive conduct has occurred." *Huron Valley Hosp.*, 792 F.2d at 567.[7]

To be sure, the *Parker* analysis does not always require an inquiry into whether the state acted to displace competition; the *ipso facto* exemption turns only on the identity of the defendant. But the fact that *some Parker* claims are separable cannot suffice to render them *all* separable. The law is clear on this point. Most recently, in *Van Cauwenberghe*, the Court recognized that although "in certain cases" an interlocutory order "will not require significant inquiry into the facts and legal issues presented by a case, and an immediate appeal might result in substantial savings of time and expense for both the litigants and the courts," a court should "look to categories of cases, not to particular injustices" in fashioning a rule of appealability in collateral order cases. 486 U.S. at 529; *see also Cunningham*, 527 U.S. at 206 ("[W]e have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral."); *Carefirst*, 305 F.3d at 261 ("The determination of whether an order satisfies the requirements of the collateral order doctrine must be made by applying the requirements *to the general category to*

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[7] Of course, *Huron Valley*, like *Parker*, involved a case under the Sherman Act. This case, by contrast, originated under the Federal Trade Commission Act, 15 U.S.C.A. § 45 (West 1997). But this distinction does not render *Parker* inapplicable. *See Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, (1992) (applying *Parker* analysis in case arising only under FTCA). Nor does this fact change our analysis of the separability of the *Parker* claim from the merits action; while "unfair competition" may not be coterminous with "anticompetitive conduct," the two concepts are still intimately intertwined. Indeed, anticompetitive conduct under the Sherman Act is a species of "unfair competition" under 15 U.S.C.A. § 45. *See Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 690-94 (1948).

which the disputed order belongs, not on a case-by-case basis to every order sought to be appealed." (emphasis added)).

Because the *Parker* analysis is not separable from the merits of this action, the FTC's refusal to extend *Parker* protection to the Board cannot be a collateral order. *See Carefirst*, 305 F.3d at 261 (an order must meet all three requirements to be appealable). But even if it were separable from the merits, the order at issue still would not be immediately appealable because, as explained below, it is not "effectively unreviewable" after trial.

IV.

To be "effectively unreviewable," an order must protect an interest that would be "essentially *destroyed* if its vindication must be postponed until trial is completed." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989) (emphasis added). The Supreme Court has specifically directed that courts not "play word games with the concept of a 'right not to be tried.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989). "[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will*, 126 S. Ct. at 959.

Only a limited number of interests fall into the class of rights "effectively unreviewable" after trial. Recently, the Court identified just four categories of appeals in which the values at stake created a right not to be tried: claims to (1) absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); (2) qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); (3) Eleventh Amendment sovereign

immunity, *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993); and (4) the protections of the Double Jeopardy Clause, *Abney v. United States*, 431 U.S. 651, 660 (1977). *See Will*, 126 S. Ct. at 958. In each of these cases, "some particular value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interest, and mitigating the government's advantage over the individual." *Id.* at 959. *See also id.* ("[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later.").

Given these principles, we cannot conclude that *Parker* creates an immunity from suit. The *Parker* doctrine did not arise from any concern about special harms that would result from trial. Instead, *Parker* speaks only about the proper interpretation of the Sherman Act:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker, 317 U.S. at 350-51. The Supreme Court did not say in *Parker* that states and their agencies are immune from

federal restrictions placed upon a state's regulation of commerce within its borders or that Congress *could not* otherwise make states liable for antitrust violations. On the contrary, the *Parker* Court assumed that Congress, pursuant to its Commerce Clause powers, *could* prohibit a state from engaging in acts that would otherwise be prohibited under the Sherman Act, but found "nothing in the language of the Sherman Act or in its history" that suggested that Congress had taken that presumably permissible step. *Id.* Simply put, *Parker* construed a statute. It did not identify or articulate a constitutional or common law "right not to be tried." *Parker*, therefore, recognizes a "defense" qualitatively different from the immunities described in *Will*, which focus on the harms attendant to litigation itself. Even the Fifth Circuit, on whose reasoning the Board relies, agrees with this assessment. *See Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc) ("*Parker* immunity is an inapt description, for its parentage differs from the qualified and absolute immunities of public officials.... While thus a convenient shorthand, '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation.").

Hence we cannot conclude that the Supreme Court fashioned the *Parker* state action doctrine to protect against any harm other than a misinterpretation of federal antitrust laws. Although it is undoubtedly less convenient for a party -- in this case the Board -- to have to wait until after trial to press its legal arguments, no protection afforded by *Parker* will be lost in the delay. A party denied *Parker* protection, like the Board, is in much the same position as a defendant arguing that his conduct falls outside the scope of a criminal statute. *See, e.g., United States v. Gilbert*, 430 F.3d 215 (4th Cir. 2005) (defendant maintained that his "innocent

possession" of narcotics was beyond the reach of 18 U.S.C. § 922(g)(1)). Just as that defendant must endure a trial before appealing the merits of his unsuccessful pre-trial motion, so too must the Board await a single consolidated appeal (if, indeed, it is found to have engaged in unfair competition). If we held otherwise, the important interests protected by the final judgement rule "would fade out whenever the government or an official lost an early round that could have stopped the fight." *Will*, 126 S. Ct. at 960.

V.

The Board's contrary arguments utterly fail to grapple with the text of *Parker* and its progeny. Instead, the Board argues around the margins of the issue, advancing one contention based on terminology and another based on analogy to the values protected by other collateral orders. Neither of these arguments transforms an order denying *Parker* protection into an immediately appealable collateral order.

A.

Initially, the Board maintains that *Parker must* shield parties from litigation because "[t]he Supreme Court has long referred to the state action defense created by *Parker* as '*Parker* immunity.'" Reply Brief of Appellants at 8. This argument is unpersuasive.

First, the Supreme Court did not characterize the state action antitrust doctrine as an "immunity" in the *Parker* decision itself. Indeed, although *Parker* issued in 1943, it was not until 1978 -- thirty-five years later -- that the Court first used the term "*Parker* immunity." *See City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978). Nor

have the Supreme Court's later precedents consistently referred to the doctrine as an "immunity." Rather, the Court has alternated between calling the *Parker* protection an "immunity" and an "exemption." *Compare City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370, 373-74 (1991) (using phrase "*Parker* immunity"); *Town of Hallie*, 471 U.S. at 38 (same); *S. Motor Carriers*, 471 U.S. at 53-63 (same); *Midcal Aluminum*, 445 U.S. at 105 (same); *City of Lafayette*, 435 U.S. at 415 (same), *with Fisher v. City of Berkeley*, 475 U.S. 260, 280-81 (1986) (Brennan, J., dissenting) (using phrase "Parker exemption"); *Cmty. Commc'ns Co., Inc. v. City of Boulder*, 455 U.S. 40, 47-48, 50, 53-54, 56 (1982) (same); *City of Lafayette*, 435 U.S. at 398, 407 n.33, 410, 415-16 (same); *Bates v. State Bar*, 433 U.S. 350, 359 (1977) (same). Thus, we cannot conclude that the Court's occasional after-the-fact use of the term "*Parker* immunity" created an immunity from suit.

Furthermore, even if the Court had consistently used the "immunity" label, this would not mandate that *Parker* created a right not to be tried. As Judge Posner has observed, "[w]ords like 'immunity' ... are often used interchangeably with 'privilege,' without meaning to resolve issues of appealability.... [T]he description of a defense as an 'immunity' rather than a privilege or affirmative defense (and it could be all three things, of course) does not resolve the issue whether denial of the immunity is a collateral order." *Segni*, 816 F.2d at 346 (citation omitted). For all these reasons, the Board's terminology argument fails.

B.

The Board's only other argument is that the state action antitrust doctrine *must* provide an immunity from suit

because it serves the same ends as immunities whose denials *are* immediately appealable.

Specifically, the Board contends that, like qualified immunity, *Parker* protects "the full exercise by state actors of their discretion, undeterred by the possibility of protracted antitrust litigation." Reply Brief at 6; *see also Commuter Transp. Sys.*, 801 F.2d at 1289 ("Absent state immunity local officials will avoid decisions involving antitrust laws which would expose such officials to costly litigation and conclusory allegations."). Additionally, we note that, although the Board does not press the argument, the Fifth Circuit case upon which it relies similarly analogizes *Parker* to sovereign immunity, assertedly because "[o]ne of the primary justifications of state action immunity is the same as that of Eleventh Amendment immunity -- to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties." *Martin*, 86 F.3d at 1395-96 (internal quotation marks omitted). We reject both of these analogies.

As noted above, a court must look at the entire class of *Parker* orders to determine if their denial should be immediately appealable. *See Van Cauwenberghe,* 486 U.S. at 529; *Cunningham*, 527 U.S. at 205; *Carefirst*, 305 F.3d at 261. Hence, in order for these analogies to have purchase, the "high order" values that gave rise to qualified and sovereign immunity -- the threat to officers' initiative and states' dignity -- must be present in all *Parker* cases, as they are, respectively, in all qualified and sovereign immunity cases. But these values are not present in all *Parker* cases; in this way the *Parker* exemption critically differs from both qualified and sovereign immunity.

For example, municipalities can invoke *Parker*'s protection. *See City of Lafayette*, 435 U.S. at 413. But because suits against municipalities threaten neither officers' initiative or states' dignity, cities may not assert either a qualified or sovereign immunity defense. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (municipalities not entitled to qualified immunity); *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 70 (1989) ("States are protected by the Eleventh Amendment while municipalities are not...."). Moreover, *Parker* bars all antitrust actions, regardless of the relief sought. But, because "it is unlikely that the possibility of injunctions will deter officials from the decisive exercise of their duties," *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991), and because suits for injunctions against state officials do not offend a state's dignity,[8] neither qualified nor sovereign immunity operates in cases seeking purely equitable relief. *See Rowley v. McMillan*, 502 F.2d 1326, 1331 (4th Cir. 1974) (qualified immunity "has no application to a suit for declaratory or injunctive relief"); *Wessel v. Glendening*, 306 F.3d 203, 207 n.4 (4th Cir. 2002) ("The protection of the Eleventh Amendment does not extend to suits seeking injunctive relief from state officials pursuant to *Ex Parte Young*."), *overruled on other grounds by Tennessee v. Lane*, 541 U.S. 509 (2004). Additionally, *Parker* applies in suits --

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[8] The Eleventh Amendment technically bars a person from suing a state or its agency to seek injunctive relief. *Cory v. White*, 457 U.S. 85, 91 (1982) ("Thus, the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity."). But a plaintiff may bring the suit against a state officer in his official capacity seeking prospective injunctive relief, thereby effecting the same result. *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) ("[A]n individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law.").

like this one --brought *by* the federal government. But because such suits do not offend the dignity of a state, sovereign immunity is no defense to such an action. *See United States v. Mississippi*, 380 U.S. 128, 140-41 (1965) (states are not immune from suits brought by the United States).

These incongruities fatally undermine the Board's claim that a denial of *Parker* protection, like a denial of qualified or sovereign immunity, should be immediately appealable. We simply cannot countenance the results that would accrue if we were to make all *Parker* denials appealable because, in *some but not all* cases, the underlying suit would threaten the harms against which qualified and sovereign immunity protect. Such a holding would allow an officer to appeal the denial of *Parker* protection in a suit for purely injunctive relief because the threat of a different suit -- one for damages -- might chill his initiative. Similarly, this holding would allow a city, *or even a private party*, to appeal all denials of *Parker* protection because a different defendant -- the state --would arguably suffer an indignity if sued by a private party for damages.

The Board's argument attempts to pry qualified and sovereign immunity loose from their moorings. But there is no reason to do so simply because an action asserts violations of antitrust law. We believe the more prudent course is to allow states' dignity and officers' initiative to be protected the way they always have been: through claims for sovereign and qualified immunity. Nothing stops states or public officials from asserting those defenses in addition to claiming *Parker* protection. Indeed, that is why the Board's analogy argument must fail; the only time that a party must rely on *Parker* to justify immediate appeal is when, like the

Board, it can not assert a sovereign or qualified immunity defense.

VI.

Because we lack jurisdiction, this appeal is

DISMISSED.

TRAXLER, Circuit Judge, concurring in part and concurring in the judgment:

I concur in my colleague's fine opinion except with respect to the holding in Part III. In my view, the question of whether the actor represents the state is separate and severable from the question of whether the action taken is unlawful. Nevertheless, because the district court order is not "effectively unreviewable" after trial, as pointed out by Judge Motz, I agree the order is not immediately appealable and the appeal should be dismissed for lack of jurisdiction.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Timothy J. Muris, Chairman**
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of	)	
SOUTH CAROLINA STATE BOARD OF DENTISTRY	)	**Docket No. 9311**

ORDER DENYING MOTION TO DISMISS ON STATE ACTION GROUNDS, HOLDING IN ABEYANCE MOTION TO DISMISS ON MOOTNESS GROUNDS, RETAINING JURISDICTION, AND REFERRING MOOTNESS ISSUES TO AN ADMINISTRATIVE LAW JUDGE

Respondent South Carolina State Board of Dentistry has filed a Motion to Dismiss the Complaint in this matter, based on two grounds. First, Respondent argues that the acts that are the subject of the Complaint are exempt from federal antitrust liability under the state action doctrine. Second, Respondent argues that this case is moot because it has

discontinued the challenged acts and because those acts are now barred by the 2003 amendments to state law.

The Commission has considered the Motion to Dismiss, as well as Respondent's and Complaint Counsel's briefs and oral arguments in support of and in opposition to the Motion to Dismiss. For the reasons stated in the accompanying Opinion, the Commission has determined: to deny Respondent's Motion to Dismiss on state action grounds; to hold in abeyance Respondent's Motion to Dismiss on mootness grounds; to retain jurisdiction; and to refer the mootness issues raised by Respondent's Motion to Dismiss to Chief Administrative Law Judge Stephen J. McGuire or his designee to conduct a limited inquiry and the preparation of an initial decision on the issue of whether there is a reasonable likelihood that the conduct challenged by the Complaint will recur. Accordingly,

IT IS ORDERED THAT Respondent's Motion to Dismiss on state action grounds be, and it hereby is, denied;

IT IS FURTHER ORDERED THAT Respondent's Motion to Dismiss on mootness grounds be, and it hereby is, held in abeyance;

IT IS FURTHER ORDERED THAT the Commission shall retain jurisdiction of this matter, pursuant to Commission Rule 3.42(a), 16 C.F.R. § 3.42(a); and

IT IS FURTHER ORDERED THAT the mootness issues raised by Respondent's Motion to Dismiss be, and they hereby are, referred to Chief Administrative Law Judge Stephen J. McGuire or his designee for further proceedings in accordance with the accompanying Opinion, including in particular (1) the conduct of limited discovery, for a period

Docket No. 9311

OPINION AND ORDER OF THE COMMISSION

By Thompson, Commissioner:

I. INTRODUCTION

This case presents the important question of whether the South Carolina State Board of Dentistry ("Respondent" or "the Board") violated federal antitrust law by enacting a regulation that contravened legislation designed to improve access to dental care for South Carolina's most vulnerable citizens -- children of low-income families. The Board is the regulatory authority for dentists and dental hygienists in South Carolina and this case is before the Federal Trade Commission on the Board's Motion to Dismiss the Complaint. As required by law, we accept the factual allegations in the Complaint as true for purposes of ruling on the Board's motion. Unless otherwise noted, all statements of fact in this opinion are based directly on the Complaint.

More than 40 percent of children in South Carolina are Medicaid-eligible and, in the early 1990s, only 12 percent of those received preventive dental care. According to the South Carolina Administrative Law Judge's Report, this problem is especially acute in rural areas. In 1988, the South Carolina legislature sought to remedy this problem by amending the state dental law to permit dental hygienists to provide preventive dental care to children in schools. However, the amended law did not significantly improve preventive dental care in schools, principally because it required a dentist to examine each student before performing the services. In 2000, the state legislature again amended its law to make it easier for dental hygienists to provide oral

not to exceed ninety (90) days from the date of issuance of this Order; and (2) the preparation of findings of fact and an initial decision addressing the likelihood that the Respondent may engage in future unlawful conduct under the 2003 South Carolina statute. For purposes of this proceeding, the deadline for filing the initial decision shall be determined and if necessary extended as prescribed by Commission Rule 3.51(a), 16 C.F.R. § 3.51(a), except that the deadline shall in no event be any earlier than January 31, 2005.

By the Commission.

/s/
Donald S. Clark
Secretary

SEAL
ISSUED: July 28, 2004

health care in schools. The amendments removed the requirement that "a supervising dentist [examine] the patient no more than 45 days before the [hygienist's] treatment," and added the requirement that the hygienist work "under general supervision." The Governor of South Carolina stated that the 2000 law "remove[d] a regulation that hindered access to dental care."

Following the 2000 amendments, in July 2001, the Board enacted an emergency temporary regulation that reinstated the preexamination requirement. As a result, thousands fewer children in South Carolina received preventive dental care in the latter half of 2001 than in the first half of that year. In 2003, the South Carolina legislature amended the law to state expressly that the dental examination requirements applicable in some settings do not apply to hygienists' work in public health settings. In March 2003, the Board restated its position that a dentist must see a patient and provide a treatment plan before a hygienist provides care. Thereafter, the Commission issued a complaint to enjoin the Board from requiring a dental preexamination in school settings.

The Board asserts two arguments in support of its Motion to Dismiss. The first raises the legal issue of whether the state action doctrine protects the Board's conduct from antitrust liability. We cannot conclude that the state action doctrine protects the Board's reinstatement of the preexamination requirement because the Board's actions appear to directly conflict with a specific legislative mandate. Accordingly, we deny Respondent's Motion to Dismiss the Complaint on this ground.

The Board's second argument, that changes to South Carolina law have rendered the case moot, raises a question

of disputed fact that we cannot resolve given the record at this early stage of the proceedings. In light of the narrow scope of this factual question, however, the Commission has decided to retain jurisdiction at this time and to refer this matter to the administrative law judge for a limited inquiry on the issue of whether there is a reasonable likelihood that the challenged conduct will recur. If, after this inquiry, we decide that the case is moot, the Commission can dismiss the Complaint. Absent such a determination, this matter will proceed to an administrative trial on the merits.

II. PROCEDURAL BACKGROUND

On September 12, 2003, the Commission issued an administrative complaint against the Board, alleging that the Board violated Section 5 of the Federal Trade Commission Act by "restrain[ing] competition in the provision of preventive dental care services by unreasonably restricting the delivery of dental cleanings, sealants, and topical fluoride treatments in school settings by licensed dental hygienists." Compl. ¶ 1. Specifically, the Complaint points to the Board's July 2001 adoption of an "emergency regulation" that allegedly reimposed a requirement that dentists preexamine patients before dental hygienists provide treatment in school settings. *Id.* ¶ 25. The Complaint asserts that the Board's action "deprive[d] thousands of school children -- particularly economically disadvantaged children -- of the benefits of preventive oral health care services." *Id.* ¶ 1. The Complaint also alleges that, despite subsequent actions by the state legislature, the Board presents a current threat to the delivery of preventive dental services in South Carolina. *Id.* ¶ 38.

The Commission has retained adjudicative responsibility for this matter pursuant to Rule 3.42 of the

Commission's Rules of Practice, 16 C.F.R. § 3.42 (2004). The Board filed its Motion to Dismiss the Complaint on October 21, 2003, and the Commission heard oral argument on the motion on January 13, 2004.

III. STANDARD OF REVIEW

For purposes of this review, the Commission regards the Board's motion as a motion to dismiss for failure to state a claim and applies the standard used by federal courts under Fed. R. Civ. P. 12(b)(6). *See, e.g., Schering-Plough Corp.*, 2001 FTC LEXIS 198, at *10-13 (Oct. 31, 2001). This is a high standard that requires the Respondent to show that Complaint Counsel can prove no set of facts that would entitle them to relief. *Id.* at *12 (*citing McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980)). In evaluating whether a complaint withstands a motion to dismiss, the Commission must accept as true all of the complaint's well-pled factual allegations and must construe all inferences in the light most favorable to Complaint Counsel. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *TK-7 Corp. and Moshe Tal*, 1989 FTC LEXIS 32, at *3 (May 3, 1989). Moreover, the Commission should not dismiss the complaint if the motion, or Complaint Counsel's opposition to the same, raises disputed issues of material fact. *Schering-Plough Corp.*, 2001 FTC LEXIS 198, at *12.

IV. FACTUAL ALLEGATIONS AND STATUTORY FRAMEWORK

Set forth below are the relevant facts alleged in the Complaint, together with the pertinent South Carolina statutes, regulations and any additional material properly presented for our consideration.

A. Dental Hygienists and the Board

In South Carolina, dental hygienists are "licensed health care professionals who specialize in providing preventive oral health services ... includ[ing] cleaning teeth, taking x-rays, ... providing fluoride treatments, and applying dental sealants." Compl. ¶ 11; *see also* S.C. Code Ann. § 40-15-80 (2003). Dental hygienists "practice in collaboration with a supervising dentist or under the direction of the South Carolina Department of Health and Environmental Control's public health dentist." Compl. ¶ 12; *see also* S.C. Code Ann. §§ 40-15-85; 40-15-102 ; 40-15-110.

The Board is South Carolina's regulatory authority for dentists and dental hygienists, Compl. ¶¶ 7, 9; S.C. Code Ann. § 40-15-10, and "is composed of seven dentists, one dental hygienist, and one public member." Compl. ¶ 5; *see also* S.C. Code Ann. § 40-15-20. Licensed dentists elect six of the Board's dentists, while licensed hygienists elect the Board's sole hygienist. § 40-15-20. The Governor appoints one dentist member and the public "lay" member and may "reject" any elected members based on their "unfitness," in which case additional nominees may be elected in the same manner. *Id.* Dentists that serve as members of the Board "continue to engage in the business of providing dental services for a fee." Compl. ¶ 6.

B. Statutory Framework

1. 1988 to 2000

Children in South Carolina, especially those from low-income families, have suffered from oral health problems due to inadequate access to preventive dental care. Compl. ¶ 14. The need for preventive dental care for

underprivileged children is partly due to the unavailability of dentists and is especially acute in rural areas. Pub. Hr'g Report of the Admin. Law Judge, *In re: Proposed Regulation*, Doc. No. 2644, Docket No. 01-ALJ-11-0348-RH, at 17- 18 (S.C. A.L.J. Feb. 11, 2002) (RX-10) ("ALJ Report"). In 1988, the South Carolina General Assembly amended the state law relating to dentists, dental hygienists and dental technicians (referred to herein as the "Dental Practice Act" or the "DPA") to authorize, subject to certain restrictions, dental hygienists to provide various oral health services in public settings, including schools. Compl. ¶ 15; 1988 S.C. Act No. 439. Section § 40-15-80 of this legislation authorized hygienists to apply topical fluoride and to perform oral screenings in a school setting "without the presence of a dentist on the premises." S.C. Code Ann. § 40-15-80(B)(1999).

Additionally, this law permitted dental hygienists to apply sealants and oral prophylaxis in a school setting upon satisfaction of the following conditions: (1) the student had written permission from a parent or guardian; (2) the treatments were authorized by a licensed dentist; (3) the student was not an active patient of another dentist; and (4) the authorizing dentist had examined the student and given written authorization within 45 days before application of the sealant or oral prophylaxis. Compl. ¶ 18; § 40-15-80(C)(1)-(3) (1999). The Complaint alleges that, despite this authorization, the 1988 law "did not significantly increase the delivery of dental hygienists' services in school settings." Compl. ¶ 15.

2. The 2000 Dental Practice Act Amendments

In 2000, South Carolina increased Medicaid reimbursement for dental services. Compl. ¶ 16. The

legislature also "amended its statutes to make it easier for dental hygienists to deliver preventive dental care services in school settings." Compl. ¶ 18; *see also* 2000 S.C. Act No. 298. For example, Section 40-15-80(B) of the DPA, as amended in 2000, permitted dental hygienists to apply sealants, topical fluoride, and oral prophylaxis[9] in a school setting, provided they had "written permission" from the student's parent or guardian and that such treatment by the dental hygienist was done "under general supervision." *See also* Compl. ¶ 19. The amended DPA defined "general supervision" to require that either a licensed dentist or a state public health dentist "has authorized the procedures to be performed but does not require that a dentist be present when the procedures are performed." S.C. Code Ann. § 40-15-85(B) (2000)[10]. The amended statute did not include, or

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[9] Oral prophylaxis is defined as "the removal of any and all hard and soft deposits, accretions, toxins, and stain from any natural or restored surfaces of teeth or prosthetic devices by scaling and polishing as a preventive measure for the control of local irritational factors." § 40-15-85(3) (2003).

[10] In contrast, a hygienist in a private office setting required "direct supervision" by a dentist that included that the dentist "personally diagnoses the condition to be treated ...." § 40-15-85(A) (2000). The 2000 amendments also clarified that the DPA was "not intended to establish independent dental hygiene practice," § 40-15-80(F) (2000), and required dental hygienists in public health settings to have professional liability insurance, § 40-15-80(G) (2000). Further, the 2000 law permitted dental hygienists "employed within the public health system" to provide "primary preventive care" services "under the direction and control of the State Director of Public Health Dentistry but [did] not require that the director be present when authorized services are provided. If a licensed dentist is available, an examination and diagnosis must be made by him before a sealant is placed on a tooth." § 40-15-110 (2000).

indeed make any reference to, the 45-day dentist preexamination requirement set forth in the prior version of § 40-15-80(C)(3). Compl. ¶ 19; *see* S.C. Code Ann. § 40-15-80(B) (2000).

The Complaint asserts that the 2000 amendments prevented the Board from requiring "a dentist examination as a condition of a dental hygienist's providing preventive services in a school setting." Compl. ¶ 19; *see also infra* at 24-27. In signing the 2000 amendments, the South Carolina Governor's office stated that the "new law removes a regulation that hindered access to dental care" and noted that doing so would "allow[] dental hygienists to offer preventive dental care in places such as schools ... [where] [d]entists rarely practice full-time." Compl. ¶ 20; State of S.C., Office of the Governor, *New Law Makes Children's Dental Care More Accessible* (May 26, 2000) (press release) (cited in Resp. Ex. ("RX")-4 (ex. 7)).

Following enactment of the 2000 amendments, Health Promotion Specialists ("HPS"), an organization composed of dental hygienists that contracted with supervising dentists, began using dental hygienists to provide preventive dental care on-site to children in South Carolina schools. Compl. ¶ 22. By July 2001, HPS had screened over 19,000 children and had provided services to over 4,000, of whom almost 3,000 were Medicaid-eligible. Compl. ¶ 23.

3. The Board's 2001 Emergency Regulation and Subsequent Actions

On July 13, 2001, the Board promulgated emergency regulation 39-18 (the "Emergency Regulation") to "clarify the type of authorization" required for dental hygienists to administer care in school settings under Section 40-15-

85(B) of the amended DPA. 25-7 S.C. Reg. 79; Compl. ¶ 25. The Emergency Regulation needed only the approval of the Board, a majority of whose members were dentists with a financial interest in reimposing the preexamination requirement. Compl. ¶ 26; § 40-15-20.

Through the Emergency Regulation, the Board interpreted the general supervision standard of Section 40-15-85(B) as it applied to dental hygienists and specified that this standard required a licensed dentist to examine clinically each patient and actually determine the need for any treatment "not more than forty-five (45) days prior to the date the dental hygienist is to perform the procedure for the patient." 25-7 S.C. Reg. 79, 39-18(A); Compl. ¶ 25. The Complaint alleges that the Board's Emergency Regulation "re-imposed the same examination requirement that the General Assembly removed in 2000: that a supervising dentist had to examine the patient no more than 45 days prior to treatment." Compl. ¶ 25. The Complaint further alleges that this action "reduce[d] substantially the number of children (particularly economically disadvantaged children) who received preventive dental care." Compl. ¶ 28.

In 2001, HPS challenged the Emergency Regulation in state court. The state court denied HPS's motion for a temporary restraining order because HPS had not exhausted its administrative remedies, and because the court agreed with the Board that the Emergency Regulation reasonably clarified the term "general supervision" in the 2000 amendments to include dental preexaminations. *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, No. 01-CP-40-3148 (S.C.C.P. County of Richland Aug. 24, 2001). However, the state appellate court affirmed the decision solely on the exhaustion grounds. *Health*

Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, No. 2003-UP-232 (S.C. Ct. App. Mar. 26, 2003).

In August 2001, the Board published a proposed permanent regulation that was substantially identical to the Emergency Regulation. Compl. ¶ 30; ALJ Report at 2-4. As required by state law, a South Carolina administrative law judge ("ALJ") held a public hearing to determine whether the proposed permanent regulation was "a reasonable exercise of the Board's authority." Compl. ¶ 31; ALJ Report at 2, 17. The state ALJ's determination would guide the General Assembly in determining whether to effectuate the proposed permanent regulation. *Id.* In February 2002, the ALJ issued his conclusion that "the Board's proposed permanent regulation was unreasonable and contravened state policy to the extent it reinstated the dentist preexamination requirement that the legislature had eliminated in 2000." Compl. ¶ 32; *see also* ALJ Report at 17-18. The ALJ held that the state legislature intended through the 2000 amendments to delete the preexamination requirement in order "to increase access to preventive oral health care for low-income children." Compl. ¶ 33; *see also* ALJ Report at 17-18.

The Board did not submit the proposed permanent regulation to the General Assembly for review, and the permanent regulation did not take effect. Compl. ¶ 34. In accordance with South Carolina state law, the Emergency Regulation terminated in January 2002, 180 days after adoption. Compl. ¶ 26. Following the Emergency Regulation's termination, several firms, including HPS, resumed providing preventive dental care to thousands of school children in South Carolina. Compl. ¶¶ 35-36.

4. 2003 DPA Amendments

In May 2003, the General Assembly again amended the DPA, altering the supervision requirements for dental hygienists operating in certain settings and specifically referencing their authority to provide preventive dental care in certain public health settings without a requirement for preexamination by a dentist. The new S.C. Code Ann. § 40-15-110(A)(10) (2003), expressly provides that "[n]othing in this chapter may be construed to prevent ... a licensed dental hygienist employed within or contracted through the public health system from providing ... primary preventive care that is reversible." This section further states that the services that may be provided in a public health setting include "oral prophylaxis, application of topical fluoride including varnish, and the application of dental sealants." *Id.* Although such services "are to be performed under the direction of" a specified state official or his designee, the new section does not require a dentist's presence and there is no reference to a preexamination requirement. *Id.*[11]

5. The Board's March 2003 Meeting and the October 2003 Resolution

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[11] The 2003 statute retains the basic definition of "general supervision" (§ 40-15-85(2)), but expands the range of settings in which it may apply -- including, *e.g.*, private office settings. Another new provision, § 40-15-102, further defines the services that may be performed under "general supervision" in a private office and in some school settings and imposes further "restrictions" on the provision of those services in those settings. §§ 40-15-102(B)-(D). Such restrictions relate principally to examination by a dentist. § 40-15-102(C). Nevertheless, consistent with § 40-15-110's express allowance of hygienist services in public health settings, such settings are specifically exempted from the additional restrictions of § 40-15-102. *See* § 40-15-102(D).

In March 2003, two months before the General Assembly enacted the 2003 amendments, the Board met to consider the statutory revisions. The Complaint alleges that at this meeting, the Board "maintained that *in all settings where a dental hygienist provides treatment -- whether public health or private practice -- a licensed dentist has to see the patient and provide a treatment plan.*" Compl. ¶ 38 (emphasis added); *see also* S.C. Bd. of Dentistry, Mins. from Conference Call, 4 (Mar. 6, 2003) (RX-13 (attach. B)).

On October 16, 2003, following the Commission's issuance of the Complaint in this matter, the Board issued a resolution (the "Resolution") stating that preexaminations of a patient were not required as a precondition to a dental hygienist's working in a public health setting, and that the Board would not seek any change to that policy. *See* RX-13 (attach. A).

V. MATERIALS BEFORE THE COMMISSION

The Commission is limited in what it may consider to resolve a motion to dismiss for failure to state a claim. In addition to the complaint, the Commission may consider documents attached to or referenced in the complaint whose authenticity is unchallenged, as well as matters of official or judicial notice that are "not subject to reasonable dispute," without converting the motion to one for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (citing Fed. R. Evid. 201(b)); *In re K-Tel Int'l, Inc. Secs. Litig.*, 300 F.3d 881, 889 (8th Cir. 2002) (in addition to pleadings, the court may consider "materials 'embraced by the pleadings' and materials that are part of the public record") (citation omitted); *Pryor v. NCAA*, 288 F.3d 548, 559-60 (3d Cir. 2002). Matters of official notice include those contained in public records, such as judicial decisions,

statutes, regulations, and "records and reports of administrative bodies." *Ritchie*, 342 F.3d at 909 (citation omitted).

Here, state statutes, regulations, court decisions, and other official government records material to the issues are properly referenced in the Complaint and/or are properly the subject of judicial notice.[12] The Commission may also consider material reflecting an industry's understanding or definition of technical or scientific terms at the time legislation is enacted as possible indicia of the legislature's understanding of the term. *See Order of Ry. Conductors of America v. Swan*, 329 U.S. 520, 525 (1947). Thus, we may consider the American Dental Association's ("ADA") Comprehensive Policy Statement on Dental Auxiliaries in

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[12] These materials include: the 2000 amendments to the South Carolina DPA (RX-2); the 2003 amendments to the DPA (RX-12); the Board's Emergency Regulation 39-18 and proposed permanent regulation 39-18 (RX-3 (ex. B)); the Office of the Governor's 2000 press release (RX-4 (ex. 7)); the order in *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, supra* (RX-8); the ALJ Report (RX-10); and the minutes of the Board's March 6, 2003, conference call (RX-13 (attach. B)). Additionally, the Board has proffered its October 16, 2003 Resolution (RX-13 (attach. A)). This post-complaint document relates to the Board's mootness defense, and the Commission can judicially notice such a document as an official government record. However, we will not give the document any particular weight at this time, much less resolve the Board's mootness defense on the basis of this one submission. We consider this document only in the context of our discussion in Part VI.B., *infra*, referring the case to the FTC administrative law judge for more complete discovery relating to the mootness issue.

effect in 2000, RX-3 (ex. C, attach.), which includes the ADA's various standards for supervision of dental auxiliaries.

In addition to these submissions, the Board has made a number of factual assertions in its briefs and has referenced several documents, including affidavits, letters, brochures, and Internet websites, that discuss factual issues that the Complaint does not reference and that are not appropriate subjects of judicial notice.[13] The Board explains that it submitted some of these materials to provide "background information," while the rest were "submitted not for the truth of the matters asserted therein," but for some other undisclosed purpose. *See* Resp.'s Reply Mem. in Support of Mot. to Dismiss ("Reply"), Appendix A. Although the Commission always has discretion to consider extra-pleading material and to convert a motion to dismiss to one for summary judgment, *see, e.g., Poole v. County of Otero*, 271 F.3d 955, 957 n.2 (10th Cir. 2001); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1366 (2d ed. 1990 & Supp. 2004), we decline to do so here. We believe that it would be inappropriate to consider the Board's proffered limited evidence at this stage. The Board's factual material is not comprehensive and can best be described as "scanty, incomplete, or inconclusive" and unlikely "to facilitate the disposition of the action" at this stage. Wright & Miller, § 1366, at 493 and 676 n.16.1. Permitting selective evidence at this stage would also unfairly prejudice Complaint Counsel, who have not yet had an opportunity to

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[13] Complaint Counsel specifically object to the following documents attached to the Board's motion to dismiss: RX-1 (and attachments A, B and C); RX-3 (and attached exhibit A and a portion of exhibit C); RX-4 (and attached exhibits 2 and 6); and RX-5, RX-6 and RX-7. Compl. Counsel's Opp'n to Resp't Mot. to Dismiss, App. A.

conduct discovery or respond to the proffered evidence. The Board may instead submit any relevant material -- whether it relates to the case's general "background," the Board's mootness defense, or some other relevant issue -- following discovery at the summary judgment stage or at trial.[14]

VI. CONCLUSIONS OF LAW

A. Whether the State Action Doctrine Applies to the Board's Actions

The Board asserts that the challenged acts were those of the State of South Carolina and, as such, are exempt from federal antitrust liability under the state action doctrine. First, the Board claims that its status as an agency of the state of South Carolina necessarily or "*ipso facto*" makes its actions those of the state. Alternatively, the Board argues that it is covered by the state action doctrine because it acted pursuant to a "clearly articulated" state policy to displace competition. The Board also argues that, even if it erred by adopting the Emergency Regulation, such error did not deprive it of state action protection. We are unpersuaded by these arguments and therefore deny the Motion to Dismiss on this ground.

1. The State Action Doctrine

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[14] The mere fact that the Commission perused the materials submitted by the Board to determine whether to consider them does not automatically convert the Board's Motion to Dismiss into one for summary judgment. *See Homart Dev. Co. v. Sigman*, 868 F.2d 1556, 1561-62 (11th Cir. 1989).

It is well-settled that the state action doctrine protects a state government, acting as sovereign, from liability under the federal antitrust laws. The Supreme Court first articulated this doctrine in *Parker v. Brown*, 317 U.S. 341 (1943), where the Court upheld California's Agricultural Prorate Act against a Sherman Act challenge. Although the legislation at issue clearly restricted competition among California's agricultural commodities growers, the Court concluded that the Sherman Act did not restrain the state, acting through its legislature, from undertaking anticompetitive actions. The Court based its holding on the recognition that, under a dual system of government, the state is "sovereign, save only as Congress may constitutionally subtract from [its] authority," and the Court would not lightly infer Congressional intention to "nullify a state's control over its officers and agents." *Id.* at 351. Where the Sherman Act was silent and gave "no hint that it was intended to restrain state action or official action directed by a state," the Court refused to read such intent into the act. *Id.*

Subsequent Supreme Court case law has confirmed and elaborated on the state's ability to restrain competition. In *Hoover v. Ronwin*, the Supreme Court explained that *Parker* imparts automatic, or *ipso facto*, protection from antitrust liability to state legislative acts. *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984) ("when a state legislature adopts legislation, its actions constitute those of the State ... and *ipso facto* are exempt from the operation of the antitrust laws") (citation omitted). The Court has also extended this *ipso facto* treatment to a state's supreme court when the court acts in a legislative, rather than in a judicial, capacity. *Id.* at 568 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977)). *See also Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 63 (1985) ("*Parker* immunity is available only when the challenged activity is

undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature ... or a State Supreme Court ....") (citations omitted).

Where the actor is neither the state legislature nor the supreme court, but is instead a political subdivision of a state or a private party ostensibly acting pursuant to state authorization, the Court has applied a more rigorous analysis to determine whether the entity is excluded from the federal antitrust laws. In such cases, the Court has held that the party is not *ipso facto* entitled to state action protection; rather, the party must demonstrate that it acted pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition in favor of regulation and that the state actively supervised the actions. *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 105 (1980) (citations omitted). *Midcal's* analytical framework provides guidance as to when state action protection is applicable to private parties as well as to nonsovereign state entities regulating private parties. *See, e.g., Southern Motor Carriers*, 471 U.S. at 57-66 (applying standard); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631-40 (1992) (applying *Midcal* analysis to state-licensed title insurance rate bureaus).

2. The Board Is Not *Ipso Facto* Protected by *Parker* and Its Progeny

The Board is undoubtedly a state regulatory agency with broad powers to supervise the fields of dentistry and dental hygiene in South Carolina.[15] As discussed above,

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[15] "The practice of dentistry and dental hygiene ... shall be under the supervision of [the Board]." S.C. Code Ann. § 40-15-10. Section 40-15-40 authorizes the Board to "adopt rules and regulations not inconsistent with this chapter for its own

however, the Supreme Court has accorded *ipso facto* state action status only to state legislatures or supreme courts. The Court has not decided whether a state Governor may ever be sovereign for state action purposes. *See Hoover*, 466 U.S. at 568 n.17. However, it has indicated that "state agencies" regulating private parties are not ipso facto excluded from antitrust scrutiny. *See Southern Motor Carriers*, 471 U.S. at 57 ("[t]he circumstances in which *Parker* immunity is available to private parties, *and to state agencies or officials regulating the conduct of private parties*, are defined most specifically by our decision in [*Midcal*]," applying its two-part test) (emphasis added). For those "nonsovereign state representative[s]," [c]loser analysis is required ... to ensure that the anticompetitive conduct of the State's representative was contemplated by the State." *Hoover*, 466 U.S. at 568-69.

Despite this clear precedent limiting the application of *ipso facto* state action coverage, the Board maintains that its actions are automatically exempt from federal antitrust law because of its status as a state agency. The Board points to the fact that it is a body created by state statute, S.C. Code Ann. § 40-15-10 *et seq.*, whose members are appointed and removed by the Governor, § 40-15-20, and are required by state law to hold regular meetings, and whose financial and employment matters are regulated by the Director of the Department of Labor, Licensing and Regulation. § 40-1-50(D). Mem. in Support of Mot. to Dismiss at 24-25. The Commission, however, concludes that the Board is not sufficiently sovereign to be necessarily exempt from the antitrust laws.

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organization and for the practice of dentistry and dental hygiene ... and for carrying out the provisions of this chapter, and [to] amend, modify and repeal any rules and regulations from time to time."

The Board relies on several cases holding that state executive departments may be entitled to *ipso facto* protection in the same manner as a state legislature or supreme court. *See, e.g., Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28-29 (1st Cir. 1999) (regarding "full fledged" state executive departments); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 875-76 (9th Cir. 1987) (state executive agency *ipso facto* exempt); *Deak-Perera Hawaii, Inc. v. Dept. of Transp.*, 745 F.2d 1281 (9th Cir. 1984) (same). Some courts and commentators would limit this exception to the Governor's office, 1 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶ 224, at 405 (2d ed. 2000), or to the Governor himself and not other executive branch agencies. *See, e.g.*, William H. Page, *Interest Groups, Antitrust, and State Regulation: Parker v. Brown in the Economic Theory of Legislation*, 1987 Duke L.J. 618, 637 n.113 (1987). We need not, however, determine whether state executives or departments are ever *ipso facto* covered by the state action doctrine because that issue is not before us. Instead, the Board is best characterized as a "subordinate" state special purpose instrumentality or industry regulatory body.

Further, courts have long rejected extending ipso facto state action treatment to such governmental entities because they lack sufficient attributes of state sovereignty. *See, e.g., Southern Motor Carriers*, 471 U.S. at 62-63 (state Public Service Commissions that set intrastate motor common carriers' rates, "[a]cting alone," are not sovereign and cannot immunize private anticompetitive conduct); Goldfarb v. Virginia State Bar, 421 U.S. 773, 790- 92 (1975) (state bar association, which was a state agency for certain purposes, was not the "State" under the *Parker* doctrine);

Cine 42nd Street Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032, 1044 (2d Cir. 1986) (state Urban Development Corporation, created by statute and designated a "governmental agency" and a "political subdivision," was not "sovereign" for *Parker* purposes). Declining to treat such non-elected governmental entities as equivalent to the state itself comports fully with the policies of the state action doctrine because such entities lack the political accountability to formulate state competition policy. See, e.g., William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Insurance Co.*, 3 Sup. Ct. Econ. Rev. 189, 205-07 (1993) (state action protection based on "political legitimacy" of state entity).

Courts have also consistently declined to afford *ipso facto* state action status to state licensing or regulatory boards that are composed at least in part of members of the regulated industry. *See Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033, 1040-41 (5th Cir. 1998) (state licensing board consisting of private accountants not the "state," and its actions "subjected to greater scrutiny" under the *Midcal* clear articulation analysis); *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.) (state pharmacy board, consisting of private pharmacists, is a "subordinate governmental unit" and therefore undeserving of *ipso facto* state action status); *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 612-13 (1988) (state optometric licensing board not entitled to *ipso facto* state action treatment). In fact, the Supreme Court has noted that, other than the legal profession, it was unaware of "any trade or other profession in which the licensing of its members is determined directly by the sovereign itself ...." *Hoover*, 466 U.S. at 580 n.34.[16]

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[16] Moreover, the Board's reliance on other cases, *see, e.g., Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553,

For these reasons, we reject the Board's contention that it is entitled to *ipso facto* state action treatment and turn to whether the Board's challenged action -- enacting the Emergency Regulation that required dental preexaminations -- was taken pursuant to a "clearly articulated" state legislative policy.

3. The Board's Emergency Regulation Does Not Satisfy the Clear Articulation Test

As discussed above, the Supreme Court in *Midcal* articulated the test for determining whether the actions of a private party or a nonsovereign state entity like the Board are exempt from antitrust law under the state action doctrine. This test requires, first, that the challenged conduct proceed from a "clearly articulated and affirmatively expressed" state policy to *displace* competition and, second, that the state "actively supervise[]" the conduct. *Midcal*, 445 U.S. at 105 (citations omitted). These two elements together address the economic and federalism concerns underlying the state action doctrine by "reconcil[ing] the interests of the states in adopting noncompetitive policies with the strong national policy favoring competition," Areeda & Hovenkamp, *supra*, ¶ 221, at 374, and by ensuring that the antitrust laws will be displaced only where there is a "a deliberate and intended state policy." *Ticor Title Ins. Co.*, 504 U.S. at 636. This principle also ensures that the state entity is held politically accountable for its anticompetitive policies.

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556 (5th Cir. 1988), is misplaced because state action treatment is not dependent on Eleventh Amendment standards, and, in any event, the Eleventh Amendment is not a bar to suit such as this one brought by the federal government.

In *Midcal*, the Court reviewed a California wine pricing system that required all wine producers and wholesalers in the state to file fair trade contracts or price schedules with the state. *Midcal*, 445 U.S. at 99. The California system specifically barred any state-licensed wine merchant from selling wine to a retailer at a price below the scheduled price. Because the "legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance," *id.* at 105, the Court held that the pricing system satisfied the clear articulation test.[17]

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[17] The *Midcal* Court held, however, that the state pricing scheme did not satisfy the "active supervision" requirement and affirmed the California state court ruling that the scheme violated the Sherman Act. *Id.* The "active supervision" test requires that "the State has exercised sufficient independent judgment and control so that the details of the [restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor Title Ins. Co.*, 504 U.S. at 634-35.

The Board argues that the active supervision test does not apply to any governmental entity. The Supreme Court has held that municipalities, unlike private parties, are not subject to the active supervision requirement and are protected by the state action doctrine if they are acting pursuant to a clearly articulated state policy. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985). The Court indicated in dicta that "it is likely that active state supervision would also not be required" when the relevant actor is a "state agency," but declined to resolve the issue. *Id.* at 46 n.10. Thus, the role of active supervision for the myriad varieties of governmental and quasi-governmental entities, including state regulatory boards, remains unclear. See FTC, Office of Policy Planning, Report of the State Action Task Force 15-19, 37-40, 55-56 (Sept. 2003) ("FTC Staff Report"). Because our analysis of the clear articulation requirement provides sufficient reason to deny the Board's motion to dismiss, we need not address whether active supervision is required under these circumstances.

A line of post-*Midcal* cases more fully defines the parameters of the clear articulation standard. In *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982), the Court held that the City of Boulder's moratorium on cable television expansions did not meet the clear articulation standard, even though Colorado's constitution vested municipalities with extensive powers of self-government in local and municipal matters. The Court found that despite the state's broad grant of power to localities, Colorado's position was "one of mere *neutrality*" with respect to the challenged conduct. *Boulder*, 455 U.S. at 55 (emphasis in the original). Consequently, the Court refused to find that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances." *Id.* at 56.

By contrast, the Court in *Southern Motor Carriers* analyzed a Mississippi statute that authorized a state commission to regulate common carriers. In directing the commission to establish "just and reasonable" rates for intrastate transportation of commodities, the legislature clearly articulated "that intrastate rates would be determined by a regulatory agency, rather than by the market." *Southern Motor Carriers*, 471 U.S. at 63-64 (citation omitted). The Court found that the challenged rate-setting program followed a clearly articulated policy to displace competition, even though the details of the rate-setting were under the agency's discretion. In doing so, the Court stated that the clear articulation test does not require "express authorization

for every action that an agency might find necessary to effectuate state policy." *Id.* at 64.

Within the clear articulation parameters set forth in *Boulder* and *Southern Motor Carriers*, the Court has described factors relevant to determining whether a nonsovereign entity's anticompetitive conduct follows a clear state policy. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370-73 (1991), for example, the Court held that a city council's ordinance restricting "the size, location, and spacing of billboards" met the clear articulation standard because the anticompetitive effects of such zoning restrictions were a "foreseeable result" of the statutes authorizing the city to regulate the use and construction of structures on city land. This test was satisfied because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." 499 U.S. at 373. The Court also found foreseeability a useful tool in determining clear articulation in *Town of Hallie*, 471 U.S. at 41-42, where state law specifically authorized Wisconsin cities to delineate the area within which they would provide certain sewage services.[18] Unincorporated townships located next to the City of Eau Claire alleged that the city had "used its monopoly over sewage treatment to gain an unlawful monopoly over the provision of sewage collection and transportation services." *Id.* at 37. The Court rejected this contention and concluded that "the statutes clearly contemplate that a city may engage in anticompetitive

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[18] *Southern Motor Carriers* -- decided the same day as *Town of Hallie* -- did not apply the foreseeability analysis, indicating that such analysis, while relevant, is not always necessary to determine clear articulation.

conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id.* at 42.[19]

Based on these post-*Midcal* cases, we can conclude that, while clear articulation does not require a state entity to show "express authorization" for every specific anticompetitive act, *Southern Motors Carriers*, 471 U.S. at 64, it does anticipate that the anticompetitive action will have a significant nexus to, or degree of "foreseeability" stemming from, an identifiable state policy. *City of Columbia*, 499 U.S. at 373. "Foreseeability" in this context, however, must be restricted to only those regulatory schemes in which the anticompetitive conduct would "ordinarily or routinely result" from the authorizing legislation in order to ensure that there was a deliberate and intended state policy. *See* FTC Staff Report 33-34. In any event, a state's "general grant of power" to a political subdivision, without more, is insufficient for purposes of clear articulation under the state action doctrine. *Boulder*, 455 U.S. at 56.[20]

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[19] Two pre-*Midcal* cases that denied state action treatment also provide insight into the clear articulation analysis. *See Goldfarb*, 421 U.S. at 790- 92 (denying state action exemption because, although lawyers were subject to ethical codes issued by the state Supreme Court, the state court did not require or approve of state bar opinions placing minimum fee schedules for title searches); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584-85 (1976) (denying state action exemption for a public utility that distributed free light bulbs as part of a light bulb exchange program, despite state's approval of utility's tariff that included the exchange program, where, at most, state policy was "neutral" with respect to the program).

[20] Certain lower courts have confused general authority to regulate with a state policy to displace competition. *See, e.g., Earles*, 139 F.3d at 1042; *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138 (1st Cir. 1993). Other courts have

Here, the Board contends that its enactment of the Emergency Regulation satisfies the *Midcal* test, arguing that "[w]hen a state regulatory board has been given comprehensive authority to regulate a profession, such broad grant of authority has been held sufficient to satisfy the 'clear articulation' requirement for state action immunity." Mem. in Support of Mot. to Dismiss at 33 (*citing Earles, supra*). The Board further asserts that its enactment of the Emergency Regulation was the "foreseeable result" of South Carolina's grant of "comprehensive power to regulate both the practice of dentistry and the auxiliary practice of dental hygiene." *Id.* We do not agree that the Board has established grounds for dismissal based on these assertions.

It is undisputed that South Carolina's statutory regime gives the Board broad general authority to regulate the fields of dentistry and dental hygiene. *See, e.g.*, S.C. Code Ann. §§ 40-15-10; 40-15-40 (2003). South Carolina law also vests the Board with authority to regulate many specific aspects of dentistry and dental hygiene in the state, including licensing, specialization, advertising, and disciplining improper

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made this distinction, analyzing whether the state intended to displace competition concerning the particular conduct at issue in addition to whether the governmental body was provided regulatory authority. *See, e.g., Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937 (9th Cir. 1996); *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1267-68 (3d Cir. 1994); *see also* Areeda & Hovenkamp, supra, ¶ 225, at 437.

conduct.[21] This comprehensive legislative scheme necessarily allows the Board to displace competition in the provision of dentistry and dental hygiene services. For example, it is certainly an ordinary and foreseeable consequence of such a scheme that the Board will limit those practices to persons with adequate training and upon successful examination and will bar lay persons from such practices, even though doing so clearly limits in some sense "competition" for dental services.

Nevertheless, it cannot similarly be shown that the particular conduct alleged to be improper here -- imposition of the preexamination requirement by the Board in its Emergency Regulation -- was the foreseeable result of the DPA as amended in 2000. Prior to 2000, dental hygienists in South Carolina could apply sealants and oral prophylaxis in school settings only if four specific requirements were met: written parental permission; authorization from a licensed dentist; that the student not be the active patient of another dentist; and preexamination by the authorizing dentist within 45 days of treatment. S.C. Code Ann. § 40-15-80(C) (1999); Compl. ¶ 18. In 2000, the General Assembly amended the

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[21] For example, the DPA requires that a license can be issued only after examination, §§ 40-15-100, 40-15-140; provides various grounds to discipline dentists and dental hygienists, §§ 40-15-190(A), 40-15-140; regulates the manner in which dentists may advertise, § 40-15-130; imposes additional requirements on dentists who want to specialize in areas of practice, § 40-15-220; and requires that only dentists may control the use of dental equipment in a dental office and that dentists retain control over the selection of a course of treatment of a patient. § 40-15-135.

law to permit such treatment only with written parental permission and under the "general supervision" of a dentist. S.C. Code Ann. § 40-15-80(B) (2000); Compl. ¶ 19. "General supervision," in turn, required only that a dentist "has authorized the procedures to be performed but [did] not require that a dentist be present when the procedures are performed." S.C. Code Ann. § 40-15-85(B)(2000). Whatever room these amendments left for regulation by the Board, the one thing that is clear is that the General Assembly sought "to make it easier for dental hygienists to deliver preventive dental care services in school settings," Compl. ¶ 18, by deleting the 45-day preexamination requirement.

By removing this specific impediment to the ability of dental hygienists to provide preventive treatment in schools, South Carolina's legislature has recast the boundaries between two sets of regulated professionals -- the dentists and the hygienists -- in order to promote rather than displace competition between them in the provision of these services. This result is evidenced by the statement of the South Carolina's Governor's Office that the 2000 amendments "remove[d] a regulation that hindered access to dental care" and would "allow[] dental hygienists to offer preventive dental care in places such as schools ... [where] [d]entists rarely practice full-time." State of S.C., Office of the Governor, *New Law Makes Children's Dental Care More Accessible*, RX-4 (ex.7).

The Board's primary basis for asserting that it reimposed the 45-day preexamination requirement pursuant to a "clearly articulated" state policy is the statute's "general supervision" standard that requires a dentist's authorization, § 40-15-85(B) (2000). As noted above, however, the "general supervision" provision does not, on its face, impose a requirement of prior examination by a dentist, much less

"clearly articulate" a state policy that hygienists' ability to offer preventive dental services in school settings was to be subject to such a restriction. In parsing the General Assembly's 2000 enactment, we of course read the statute as "a symmetrical and coherent regulatory scheme" and "an harmonious whole." *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted). We find it relevant that while the 2000 enactment added the "general supervision" requirement, it simultaneously and expressly eliminated the preexamination requirement that existed previously. Applying the "commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), we can only conclude that the "general supervision" requirement does not authorize reimposition of the preexamination requirement that the Assembly had just eliminated.[22]

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[22] Moreover, any consideration of the 2003 amendments -- although of minimal value in interpreting the prior enactment, see 2A Norman J. Singer, *Statutes and Statutory Construction* § 48:20, at 488-89 (6th ed. 2000) -- would only reinforce our view of the meaning of "general supervision" in both versions of the statute. While the legislature essentially left the definition of "general supervision" unchanged in 2003 (§ 40-15-85(2)), it addressed the issue of the need for dentist examination by imposing *additional* requirements for the provision of services under "general supervision" in certain settings. *See* § 40-15-102(C). Such additional requirements would be unnecessary if, as the Board supposed, the "general supervision" requirement itself mandated prior examination by a dentist. Moreover, the 2003 statute also specifically provided for the provision of certain hygienist services in public health settings without any preexamination requirement, *see* §§ 40-15-102(D), 40-15-110(10), while leaving in place the overall requirement that services provided in school settings be subject to "general supervision" (§ 40-15-80(B)). Again, the clear inference to be drawn from this combination of provisions is that the South

The Board attempts to bolster its argument by referring to widely-available industry standards issued by the ADA as they existed in 2000, on the apparent supposition that the South Carolina legislature intended to use the term "general supervision" in conformity with those standards. As a general matter, the courts have recognized that the state action doctrine "involves a question of law, generally an issue of statutory construction." *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3d Cir. 1982); *see Telecor Communs., Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1139 (10th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003); *Trigen-Oklahoma City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1225 (10th Cir.), *cert. denied*, 534 U.S. 993 (2001). Nevertheless, as discussed above, in limited circumstances it is appropriate, even in addressing the meaning of a statutory enactment, to look to extrinsic sources that may have a bearing on the way in which the legislature used a particular term. *See* pp. 11-12, *supra*. The Board's reliance on the ADA's use of the term "general supervision," however, cannot overcome the statutory analysis set forth above, because there is no reason to conclude - that the South Carolina legislature adopted the ADA's "general supervision" standard. Indeed, all indications are to the contrary. While the ADA's definition of that term specifically requires that the dentist "has personally diagnosed the condition to be treated," *ADA Comprehensive Policy on Dental Auxiliaries* (attached to RX-3 (ex. C)), S.C. Code Ann. § 40-15- 85(B) (2000) strikingly omits this language from its provision defining "general supervision."

Carolina legislature has not understood "general supervision" to encompass a prior examination requirement.

By contrast, when the South Carolina legislature has intended to adopt an ADA definition *in toto*, it has done so expressly, as in its nearly verbatim incorporation of the ADA's definition of "direct supervision." *Compare, e.g.*, S.C. Code Ann. § 40-15-85(A) (2000) *with* RX-3 (ex. C at 8).[23]

The Board has not shown that its enactment of the Emergency Regulation reimposing the 45-day preexamination requirement was the foreseeable result of the 2000 amendments. *See Telecor Communs.*, 305 F.3d at 1139-40 (state action protection did not apply to private party defendant because its activities, rather than expressly permitted by a state policy, were contrary to the state's policy of fostering competition in the pay phone market). On the contrary, the Board's regulation appears to be in direct conflict with the South Carolina statute and inconsistent with the policy ideals behind the state action doctrine: that federalism permits the state as sovereign to displace the national policy of open competition with regulation, but only if such anticompetitive intent is clearly shown. In this way, federal antitrust policy will not be "unnecessarily and inappropriately subordinated to state policy." *Bates*, 433 U.S. at 362.

The Board's reliance on case law concluding that a state licensing board's broad grant of regulatory power necessarily contemplates certain anticompetitive conduct, *see, e.g, Earles*, 139 F.3d at 1042, is misplaced and does not cure the basic defect in its argument. Although the Board continued to have general authority over the practice of dentistry and dental hygiene, the 2000 amendments facially

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[23] Indeed, certain provisions in the DPA (concerning the licensing of dental specialties) specifically refer to ADA standards or requirements. *See, e.g.*, S.C. Code Ann. §§ 40-15-220, 40-15-250, 40-15-260 (2003).

eliminated the preexamination requirement. We therefore cannot conclude that the Board's Emergency Regulation reinstituting such a requirement was an action pursuant to a clearly articulated state policy to displace competition. Instead, the South Carolina legislature's specific direction to permit dental hygienists to provide preventive dental care in schools without preexaminations represents a discrete, pro-competitive "carve-out" from the Board's general authority over the practice of dentistry and dental hygiene. *See, e.g., Cost Management Servs.*, 99 F.3d at 942-43 (fact that state had displaced competition in the market for sale of natural gas with a regulatory structure did not provide a state action exemption for off-tariff pricing).

Finally, we also disagree with the Board's argument that the 2000 amendments maintained the state's "clearly articulated" policy to require dental preexaminations because the 2000 law removed only the requirement that a dentist be physically present when a hygienist performs certain services in schools. Mem. in Support of Mot. to Dismiss at 27-28. It is far from clear, however, whether a dentist was required to be physically present in school settings prior to 2000: the pre-2000 law made no reference to a physical presence requirement in the provision specifically governing the application of sealants and oral prophylaxis in school settings, § 40-15-80(C) (1999), and the law expressly permitted oral screenings and the application of topical fluoride "without the presence of a dentist on the premises." § 40-15- 80(B) (1999). If the aim of the 2000 statute was to delete the physical presence requirement, one would have expected such a requirement to be clearly shown in the pre-2000 law, such as by including it in its list of other requirements for the application of sealants and oral prophylaxis -- e.g., parental consent, dentist preexamination -- set forth in Section 40-15-80(C). Further, the Board's

interpretation of the 2000 law would create anomalous conditions, such as requiring preexaminations under the "general supervision" provision for fluoride treatments in school settings even though no such requirement existed before 2000.

Contrary to the Board's arguments, the plain language of the 2000 amendments indicates that the state General Assembly intended to allow dental hygienists to perform certain preventive dental treatments in schools without a prior dental examination. After all, the Assembly deleted specific language that had imposed a preexamination requirement. Moreover, as shown above, the Board has failed to show that the "general supervision" language provides a basis for its actions. In light of the 2000 statutory amendments, we cannot agree with the Board's argument that its Emergency Regulation was "clearly articulated" by state policy.[24]

4. The Board's 2001 Emergency Regulation That Contravened South Carolina's Legislative Policy Was More Than a Mere "Error" of State Administrative Law

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[24] The Board asserts that the state court finding that the 2000 amendments required a dental preexamination, *see Health Promotion Specialists, supra*, constitutes an interpretation of state law that binds the Commission. We reject this argument. Although the Commission may consider state trial court interpretations of state law, we -- like federal courts -- are not bound by such interpretations. *See, e.g., King v. Order of United Commercial Travelers*, 333 U.S. 153, 159-62 (1948). This rule is particularly applicable where the state decision was based, in part, on the argument (now abandoned by the Board) that the 2000 law effected no substantive change in the law.

The Board also argues that, even if it erred in interpreting the 2000 amendments, its promulgation of the Emergency Regulation did not so far exceed the bounds of its statutory authority to regulate as to constitute the kind of "egregious level of error" necessary to lose its state action protection. Mem. in Support of Mot. to Dismiss at 28-31; Reply at 12-19. To support its argument, the Board relies on a statement in *City of Columbia* that, under the state action doctrine, "it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the [political subdivision's] action under state law." *City of Columbia*, 499 U.S. at 372. Thus, a political subdivision would still be entitled to state action protection if it "possess[ed] the power to engage in the challenged conduct" through delegated statutory authority, even if its actual implementation of this authority were substantively or procedurally defective. *Id.* (citation omitted).

This argument is based upon a fundamental misreading of the cited *City of Columbia* passage. There the Court distinguished carefully between, on the one hand, the basic "authority to regulate" and, on the other hand, the specific authority "to suppress competition." *Id.* With respect to the former, the Court recognized that the authority of state bodies had to be read broadly, lest *any* state law error in the defendant's actions render those actions "unauthorized," and thus subject to antitrust attack. The Court rejected a rule that would thus "'transform[] ... state administrative review into a federal antitrust job.'" *Id.* (quoting Areeda & Hovemkamp, *Antitrust Law* ¶ 212.3b (Supp. 1989)). With respect to the authority to suppress competition, however, the Court emphasized the necessity of a clearly articulated state policy that authorizes the political subdivision to engage in anticompetitive conduct.

The Board's argument in the present case ignores this distinction and would eviscerate the "clear articulation" standard. Complaint Counsel have not argued that the 2001 Emergency Regulation was simply "unauthorized" under state law, in the sense of being procedurally defective or substantively incorrect in a manner that is not directly related to competitive concerns. Rather, Complaint Counsel challenge the Emergency Regulation because it is *contrary* to a specific directive of the state legislature -- one that placed an express limitation on how far the Board was permitted to go in suppressing competition. If an action of this sort could be written off as a "mere error" of state law, such a theory would swallow the clear articulation rule. An action of a subordinate state entity that ignores an express legislative limitation of this sort must fall outside the state action exemption.

5. State Action Holding

Based on the above analysis, we cannot conclude that the Board's enactment of the 2001 Emergency Regulation was protected state action. We have no reason to conclude that the Board's actions are those of the state as sovereign, so as to be *ipso facto* exempt state action. Nor can we conclude that the Board acted pursuant to a clearly articulated policy of the South Carolina legislature to displace competition. On the contrary, its actions appear to have contravened the clear legislative intent in the 2000 amendments to eliminate the preexamination requirement. Finally, the apparent flaw in the Board's actions is not a mere error of state administrative law, but relates directly to the limitations the state legislature has imposed on the Board's authority to restrict competition.

For all these reasons, we deny the Board's Motion to Dismiss on state action grounds. In so doing, we do not

foreclose entirely further proceedings on the state action issue. Although the fundamental principles of statutory construction discussed above negate rather than support the defense in this situation, it remains conceivable, for reasons discussed previously, that the Board could adduce additional materials relevant to the interpretation of the 2000 statute. *See* pp. 11-12, 26-27, *supra.*[25] We leave any further consideration of this issue, along with other issues on the merits, to be addressed in such future administrative proceedings as may be necessary in the event we find a live controversy, after the limited inquiry described below regarding possible mootness.

B. Whether This Case Is Moot

The issue of whether this case is moot raises a question of disputed fact that the Commission cannot properly resolve on Respondent's Motion to Dismiss. For the reasons set forth below, however, we refer this matter to the administrative law judge for limited discovery on the issue of whether the challenged conduct is likely to recur.

1. Respondent's Mootness Claim

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[25] As emphasized above, any such inquiry must be narrow, in light of the legal nature of the issues of statutory interpretation to be addressed. In particular, post-enactment statements, particularly those from nonofficial sources (such as from the South Carolina Dental Hygiene Association website, RX-5), are not to be considered in the course of interpreting a statute. Singer, *supra* note 14, §§ 48:11, 48:20, at 456-62, 488-89.

The Board asserts that the Commission should dismiss this case as moot because the 2003 amendments to the DPA, combined with the Emergency Regulation's expiration and the Board's actions since 2002, now ensure that hygienists are not subject to the dentist preexamination requirement and preclude the Board from engaging in the challenged conduct. In addition, the Board argues that, even if the matter is not technically moot, the Commission should still dismiss the Complaint because there is no need for the relief contemplated by the Complaint.

2. Mootness Claims and Analysis

To prove that a case is moot, the moving party must show more than just that the challenged conduct has ceased; rather, the movant must establish that there is no reasonable expectation that the conduct could recur. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot"). Where the respondent contends that it will not repeat prior conduct, it bears a heavy burden to establish that a proceeding is moot. *See The Coca-Cola Co.*, 117 F.T.C. 795, 917 (1994).

In order to meet this burden, the Board primarily relies upon the changes to the statutory framework in South Carolina. The Board specifically cites the 2003 amendments to the DPA, which it contends now prevent it from imposing a dentist preexamination requirement on hygienists offering treatment in public settings. It also cites the expiration of the Emergency Regulation, which the Board has not attempted to revive. The Board relies on several cases, *e.g.*, *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994), finding cases moot where allegedly discriminatory or

unconstitutional state statutes were repealed. However, this case does not involve the repeal of a challenged law and the 2003 amendments did not change some area of the 2000 law that formed the basis of the Complaint. Instead, the Complaint alleges violative conduct by the Board under the 2000 law -- conduct that would similarly violate the 2003 law. Moreover, the Complaint alleges facts that suggest that the Board may again engage in the type of conduct the Complaint challenges. *See* Compl. ¶ 38. Accordingly, we cannot find this action moot at this time.

The Complaint alleges that the Board met in March 2003 and considered the proposed revisions to the DPA that the General Assembly thereafter enacted. Under the heading "The Current Threat to the Delivery of Preventive Dental Services in South Carolina," Paragraph 38 of the Complaint alleges that the Board "maintained that in all settings where a dental hygienist provides treatment -- whether public health or private practice -- *a licensed dentist has to see the patient and provide a treatment plan*" (emphasis added). *See also* S.C. Bd. of Dentistry, Mins. From Conference Call (RX-13 (attach. B at 4)).

In ruling on a motion to dismiss, the Commission must accept all well-pled factual allegations as true and must construe all inferences in Complaint Counsel's favor. *See supra* Section III. We therefore accept as true that the Board met to discuss what would become the 2003 amendments and interpreted these statutory revisions to require a preexamination by a dentist in all settings before a dental hygienist can provide treatment. The Board similarly found a preexamination requirement in the 2000 amendments, which led it to enact the Emergency Regulation. Paragraph 38 thus raises the inference that the Board will once against restrict, through some emergency enactment or other action, the

ability of dental hygienists to provide treatment in school settings. In other words, the Complaint alleges facts that would clearly justify the Commission in ordering relief.

The Board's October 16, 2003, Resolution (RX-13 (attach. A)) does not alter the inference that the Board may engage in the challenged conduct in the future. First, we note that the Board did not adopt the Resolution until after the Commission had issued the Complaint, and the Board could abandon the Resolution at any time. More important, to the extent that the Resolution offers an explanation or context for Paragraph 38 of the Complaint, we find that it simply raises a question of disputed fact that the Commission cannot resolve in a motion to dismiss. *See, e.g., Schering-Plough Corp.*, 2001 FTC LEXIS 198 (Oct. 31, 2001).

Finally, the Board argues that there is no need for relief even if the matter is not "technically" moot. Motion to Dismiss at 22. We reject this argument. Because Paragraph 38 of the Complaint suggests that the Board will again engage in actions similar to those challenged, we find that the Complaint sets forth grounds for injunctive relief to address such actions. We thus decline to dismiss the Complaint on such grounds at this stage of these proceedings. *See FTC v. Citigroup Inc.*, 239 F. Supp. 2d 1302, 1306 (N.D. Ga. 2001) (denying Rule 12(b)(6) motion to dismiss and stating that an injunction may be issued if a violation is ongoing or likely to recur).

3. Mootness Holding

Accepting, as we must, all of the Complaint's factual allegations and construing all inferences in the light most favorable to Complaint Counsel, we find that the Board has not met its burden of establishing that Complaint Counsel

can prove no set of facts that would entitle them to relief. Accordingly, this case does not appear to be moot or otherwise subject to dismissal for failure to state a claim. However, our conclusion regarding mootness is based primarily on the factual allegations and inferences raised by Paragraph 38 of the Complaint, which raises the relatively narrow issue of whether there is a meaningful chance for recurrence of the challenged conduct.

During oral argument on this Motion, Respondent's counsel agreed to engage in limited discovery to assist the Commission in resolving the mootness issue. *South Carolina State Bd. of Dentistry*, Oral Argument on Mot. to Dismiss, Hr'g Tr. 71, 75-76 (Jan. 13, 2004). We find this suggestion helpful. Thus, based upon each party's interest in avoiding a potentially unnecessary trial, we exercise our discretion to refer this matter to the administrative law judge for limited discovery for ninety (90) days and an initial assessment of the likelihood that the Board may engage in future unlawful conduct under the 2003 statute. In particular, the Commission requests that the administrative law judge make findings of fact and resolve the context and significance of the Board's March 2003 meeting and the Board's October 2003 Resolution. We leave to the administrative law judge's discretion whether to hold a hearing or to request a briefing to assist the Commission in resolving the Board's mootness defense. Apart from this limited referral, we retain jurisdiction over this matter.

VII. CONCLUSION

For all the reasons stated above, the Commission denies the Board's Motion to Dismiss on state action grounds. Further, we will retain jurisdiction over this case and hold in abeyance the Board's Motion to Dismiss on

mootness grounds. We refer the matter to the administrative law judge to conduct limited discovery and to make findings of fact and an initial decision regarding the Board's mootness defense.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 27, 2006

No. 04-2006
D9311

SOUTH CAROLINA STATE
BOARD OF DENTISTRY

Petitioner

v.

FEDERAL TRADE COMMISSION

Respondent

On Petition for Rehearing and Rehearing En Banc

The petitioner's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Motz, Judge Traxler, and Judge Jones.

For the Court,

/s/ Patricia S. Connor

CLERK